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SUPREME COURT, U.S.

Nos. 06-84 and 06-100

In the Supreme Court of the United States

SAFECO INSURANCE COMPANY OF AMERICA, ET AL., PETITIONERS

v.

CHARLES BURR, ET AL.

GEICO GENERAL INSURANCE COMPANY, ET AL., PETITIONERS

v.

AJENE EDO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF VACATUR IN NO. 06-84 AND REVERSAL IN NO. 06-100

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QUESTIONS PRESENTED

The Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.*, imposes civil liability on "[a]ny person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer," 15 U.S.C. 1681n(a). The Act further requires a person who "takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report" to provide the consumer with notice of the action. 15 U.S.C. 1681m(a). The questions presented are:

1. Whether the phrase "willfully fails to comply" with the FCRA's requirements encompasses not only knowing violations of the Act, but also reckless disregard of the law's obligations and, if so, whether the court of appeals erred in articulating and applying the reckless-disregard standard.

2. Whether charging an insurance customer a higher rate based, in whole or in part, on his credit report constitutes an "adverse action," notwithstanding the fact that the insured would have received the same rate even if no consumer report had been consulted.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 1
Summary of argument 6
I. A "willful" failure to comply with the requirements of the FCRA requires proof that the defendant either knowingly or recklessly disregarded the law 8
A. "Willfully" is traditionally interpreted in civil statutes, particularly laws designed to enforce federal rights, to mean either knowing or reckless disregard of legal obligations 9
B. The structure of the Fair Credit Reporting Act demonstrates that "willfully" includes both knowing and reckless disregard of the law 13
C. Reckless disregard requires indifference to clearly established law or the disregard of an obvious and high probability that conduct is unlawful 20
II. An adverse action notice is required when the content of a consumer's credit report prevented the consumer from obtaining a better insurance rate 24
A. Providing a higher insurance rate based, in part, on a credit report constitutes an adverse action 24
B. GEICO's erroneous understanding of the adverse action provision was not willful 29
Conclusion 30
Appendix 1a

TABLE OF AUTHORITIES

Page

Cases:

A.J. McNulty & Co. v. *Secretary of Labor*, 283 F.3d 328 (D.C. Cir. 2002) 11

Aimster Copyright Litigation, In re, 334 F.3d 643 (7th Cir. 2003) 11

Armenta v. *City of Casa Grande*, 71 P.3d 359 (Ariz. Ct. App. 2003) 18

Asbury v. *Brougham*, 866 F.2d 1276 (10th Cir. 1989) ... 19

Barbour v. *Merrill*, 48 F.3d 1270 (D.C. Cir. 1995), cert. dismissed, 516 U.S. 1155 (1996) 19

Barry v. *Edmunds*, 116 U.S. 550 (1886) 21

Baystate Alternative Staffing, Inc. v. *Herman*, 163 F.3d 668 (1st Cir. 1998) 10

Bevolo v. *Carter*, 447 F.3d 979 (7th Cir. 2006) 19

Brock v. *Morello Bros. Constr., Inc.*, 809 F.2d 161 (1987) 11, 22

Bryan v. *United States*, 317 U.S. 184 (1998) 8, 9, 15

Casella v. *Equifax Credit Info. Servs.*, 56 F.3d 469 (2d Cir. 1995), cert. denied, 517 U.S. 1150 (1996) 19

Cooper v. *Rosston*, 756 P.2d 1125 (Mont. 1988) 18

Cornist v. *B.J.T. Auto Sales, Inc.*, 272 F.3d 322 (6th Cir. 2001) 26

Cushman v. *Trans Union Corp.*, 115 F.3d 220 (3d Cir. 1997) 6, 19

Dixon v. *United States*, 126 S. Ct. 2437 (2006) 12

Doe v. *Chao*, 540 U.S. 614 (2004) 13

Dun & Bradstreet, Inc. v. *Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) 17

Cases–Continued: Page

Farmer v. *Brennan*, 511 U.S. 825 (1994) 17, 20, 21, 22
Fischl v. *General Motors Acceptance Corp.*, 708 F.2d 143 (5th Cir. 1983) 19
Gertz v. *Robert Welch, Inc.*, 418 U.S. 323 (1974) 19
Hanger v. *Lake County*, 390 F.3d 579 (8th Cir. 2004) ... 11
Harlow v. *Fitzgerald*, 457 U.S. 800 (1982) 23
Harte-Hanks Commc'ns, Inc. v. *Connaughton*, 491 U.S. 657 (1989) 21
Hazen Paper Co. v. *Biggins*, 507 U.S. 604 (1993) 10, 16
Hillstrom v. *Best Western TLC Hotel*, 354 F.3d 27 (1st Cir. 2003) 11
Island Software & Computer Serv., Inc. v. *Microsoft Corp.*, 413 F.3d 257 (2d Cir. 2005) 11
Kolstad v. *American Dental Ass'n*, 527 U.S. 526 (1999) 11, 18
McKennon v. *Nashville Banner Pub. Co.*, 513 U.S. 352 (1995) 27
McLaughlin v. *Richland Shoe Co.*, 486 U.S. 128 (1988) 9, 10, 13, 16, 20, 22
Morissette v. *United States*, 342 U.S. 246 (1952) 10
Murphy v. *Waterfront Comm'n*, 378 U.S. 52 (1964) 15
Philbin v. *Trans Union Corp.*, 101 F.3d 957 (3d Cir. 1996) 28
Porter v. *New York Univ. Sch. of Law*, 392 F.3d 530 (2d Cir. 2004) 11
Professional Real Estate Investors, Inc. v. *Columbia Pictures Indus., Inc.*, 508 U.S. 49 (1993) 23
Ragin v. *Harry Macklowe Real Estate Co.*, 6 F.3d 898 (2d Cir. 1993) 19

Cases–Continued: Page

Ratzlaf v. *United States*, 510 U.S. 135 (1994) 8
Reeves v. *Carlson*, 969 P.2d 252 (Kan. 1998) 18
RSM, Inc. v. *Herbert*, No. 06-1393, 2006 WL 3026344 (4th Cir. Oct. 26, 2006) 11
Russello v. *United States*, 464 U.S. 16 (1983) 15
Saba v. *Compagnie Nationale Air France*, 78 F.3d 664 (1996) 22
Screws v. *United States*, 325 U.S. 91 (1945) 8
Shrader-Miller v. *Miller*, 855 A.2d 1139 (Me. 2004) 18
Simms v. *Royal Thrift & Loan Co.*, No. E028659, 2002 WL 32576 (Cal. Ct. App. Jan. 11, 2002) 17
Smith v. *Wade*, 461 U.S. 30 (1983) 12, 17, 23
Spies v. *United States*, 317 U.S. 492 (1943) 8
St. Amant v. *Thompson*, 390 U.S. 727 (1968) 21
Stephens v. *South Atl. Canners, Inc.*, 848 F.2d 484 (4th Cir.), cert. denied, 488 U.S. 996 (1988) 19
Stuart v. *United States*, 337 F.3d 31 (1st Cir. 2003) 19
TRW Inc. v. *Andrews*, 534 U.S. 19 (2001) 1, 27
TWA, Inc. v. *Thurston*, 469 U.S. 111 (1985) ..... *passim*
United States v. *Balistrieri*, 981 F.2d 916 (7th Cir. 1992), cert. denied, 510 U.S. 812 (1993) 19
United States v. *Bishop*, 412 U.S. 346 (1973) 8
United States v. *Gonsalves*, 435 F.3d 64 (1st Cir. 2006) 19
United States v. *Illinois Cent. R.R.*, 303 U.S. 239 (1938) 9, 22
United States v. *Murdock*, 290 U.S. 389 (1933), overruled in other part, *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52 (1964) 15

Cases–Continued: Page

Welch v. *Mr. Christmas Inc.*, 440 N.E.2d 1317 (N.Y. 1982) 18
Williams Constr. Co. v. *Garrison*, 400 A.2d 22 (Md. Ct. Spec. App. 1979) 18
Williamson v. *Handy Button Mach. Co.*, 817 F.2d 1290 (7th Cir. 1987) 19
Wilson v. *Layne*, 526 U.S. 603 (1999) 29

Constitution, treaty, statutes and regulations:

U.S. Const. Amend. I 19
Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* Oct. 12, 1929, art. 25(1), 49 Stat. 3020, 137 L.N.T.S. 27 11
Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602, 29 U.S.C. 601 *et seq.* 9, 10, 12, 18
29 U.S.C. 626(b) 10
Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.* 11, 18
Equal Credit Opportunity Act, 15 U.S.C. 1691e(b) 19
Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.* ..... *passim*
15 U.S.C. 1681(a) 2
15 U.S.C. 1681(a)(1) 2, 20
15 U.S.C. 1681(a)(2) 1
15 U.S.C. 1681(a)(4) 2, 20
15 U.S.C. 1681(b) 2, 20
15 U.S.C. 1681a(k)(1) 25

Statutes and regulations–Continued: Page

15 U.S.C. 1681a(k)(1)(B)(i) 5, 7, 25, 27
15 U.S.C. 1681b(a) (Supp. IV 2004) 26
15 U.S.C. 1681b(a)(3)(A)-(C) (Supp. IV 2004) 2
15 U.S.C. 1681b(f) 13, 14
15 U.S.C. 1681g (2000 & Supp. IV 2004) 2
15 U.S.C. 1681i (2000 & Supp. IV 2004) 2
15 U.S.C. 1681m 3
15 U.S.C. 1681m(a) 2, 27
15 U.S.C. 1681m(h)(8) (Supp. IV 2004) 1, 3
15 U.S.C. 1681n 14, 15
15 U.S.C. 1681n(a) 10, 13
15 U.S.C. 1681n(a)(1)(A) 14
15 U.S.C. 1681n(a)(1)(A)-(3) 3
15 U.S.C. 1681n(a)(1)(B) 3, 13
15 U.S.C. 1681n(b) 13, 14
15 U.S.C. 1681*o* (2000 & Supp. IV 2004) 3, 15, 16
15 U.S.C. 1681*o*(a) (2000 & Supp. IV 2004) 3
15 U.S.C. 1681p (Supp. IV 2004) 3
15 U.S.C. 1681q 14
15 U.S.C. 1681r 14
15 U.S.C. 1681s(a)-(b) (2000 & Supp. IV) 1
15 U.S.C. 1681s(a)(2)(A) 14
Fair Housing Act, 42 U.S.C. 3601 *et seq.* 19
Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.* 10, 12
29 U.S.C. 216(e) 10
29 U.S.C. 255(a) 10

Statutes and regulations–Continued: Page

Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 601(b), 80 Stat. 844 12
Family and Medical Leave Act of 1993, 29 U.S.C. 2617 . 11
Occupational Safety and Health Act of 1970, 29 U.S.C. 666(a) 11
11 U.S.C. 523(a)(6) 11
17 U.S.C. 504(c)(2) 11
18 U.S.C. 923(e) (Supp. IV 2004) 11
38 U.S.C. 1110 11
42 U.S.C. 1981 19
42 U.S.C. 1981a 18
42 U.S.C. 1981a(b)(1) 11
42 U.S.C. 1982 19
42 U.S.C. 1983 12
42 U.S.C. 2000e *et seq.* 11
Ariz. Rev. Stat. Ann. § 44-1695(c) (West 2003) 18
Cal. Civ. Code (West):
§ 1785.20 (1998) 17
§ 1785.31 (Supp. 2006) 17
§ 1786.40 (Supp. 2006) 17
Kan. Stat. Ann. (1994):
§ 50-714 18
§ 50-715 18
Me. Rev. Stat. Ann. title 10 (West):
§ 1320 (Supp. 2005) 18
§ 1322 (1997) 18

Statutes and regulations–Continued: Page

Md. Code Ann. Com. Law (LexisNexis):
§ 14-1212 (2005) 18
§ 14-1213 (Supp. 2006) 18
Mont. Code Ann (2005):
§ 31-3-131 18
§ 31-3-142 18
§ 33-18-608 18
N.Y. Gen. Bus. Law (McKinney):
§ 380-i (1996) 18
§ 380-*l* (Supp. 2006) 18
16 C.F.R. Pt. 600:
Pt. 600 App. 1, 25
Pt. 698 App. H 25

Miscellaneous:

Black's Law Dictionary (rev. 4th ed. 1968) 15
H.R. 19403, 91st Cong., 2d Sess. (1970) 17
H.R. 19410, 91st Cong., 2d Sess. (1970) 17
H.R. Conf. Rep. No. 1587, 91st Cong., 2d Sess. (1970) .. 16
H.R. Rep. No. 486, 103d Cong., 1st Sess. (1994) 26
Letter from Hannah Stires, FTC, to James Ball (Mar. 1, 2000) <http://www.ftc.gov/os/statutes/fcra/ball.htm> 30
William L. Prosser, *The Law of Torts* (4th ed. 1971) 16, 21, 22
Restatement (Second) of Torts (1979) 18
S. 823, 91st Cong., 1st Sess. (1969) 16
S. Rep. No. 517, 91st Cong., 1st Sess. (1969) 1, 16, 26

Miscellaneous–Continued:

S. Rep. No. 209, 103d Cong., 1st Sess. (1993) 25
Webster's New Int'l Dictionary (2d ed. 1958) 25
Webster's Third New Int'l Dictionary (1961) 25

INTEREST OF THE UNITED STATES

This case concerns the proper construction of the adverse-action and civil-liability provisions of the Fair Credit Reporting Act (FCRA), 15 U.S.C. 1681 *et seq.* Congress charged the Federal Trade Commission (Commission) with primary responsibility for civil enforcement of the FCRA, while vesting federal banking and other agencies with complementary authority over the Act's application in certain specialized contexts. See 15 U.S.C. 1681m(h)(8)(B) (Supp. IV 2004); 15 U.S.C. 1681s(a)-(b) (2000 & Supp. IV 2004). The Commission has also issued formal guidance on the FCRA's construction and implementation, see 16 C.F.R. Pt. 600 App. The United States accordingly has a vital interest in ensuring the proper interpretation and application of the FCRA's provisions, and participated as amicus curiae in this Court's prior FCRA case. See *TRW Inc.* v. *Andrews*, 534 U.S. 19 (2001).

STATEMENT

1. a. Congress enacted the FCRA in 1970 to prevent harm to consumers arising from flaws in the credit reporting system, to protect consumer privacy, and to improve the integrity and reliability of credit reports, thereby promoting efficiency in the Nation's banking and consumer credit systems. *TRW*, 534 U.S. at 23; S. Rep. No. 517, 91st Cong., 1st Sess. 1 (1969). Congress found that "[a]n elaborate mechanism has been developed" for investigating, cataloguing, and disseminating information about the "credit standing, credit capacity, character, and general reputation" of tens of millions of consumers. 15 U.S.C. 1681(a)(2). Congress passed the FCRA "to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartial-

ity, and a respect for the consumer's right to privacy." 15 U.S.C. 1681(a)(4). Improving the "[a]ccuracy and fairness of credit reporting," 15 U.S.C. 1681(a), was critical because "[i]naccurate credit reports directly impair the efficiency of the banking system" and erode "the public confidence which is essential to the continued functioning of the banking system," 15 U.S.C. 1681(a)(1). Congress thus directed consumer reporting agencies "[to] adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information" in a manner that is "fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information." 15 U.S.C. 1681(b).

The FCRA identifies the purposes for which consumer reports may permissibly be requested and used, including the underwriting of insurance. 15 U.S.C. 1681b(a)(3)(A)-(C) (Supp. IV 2004). The Act also gives consumers the right to see their credit report, 15 U.S.C. 1681g (2000 & Supp. IV 2004), and establishes detailed procedures for the resolution of consumers' disputes over the accuracy of reports, 15 U.S.C. 1681i (2000 & Supp. IV 2004). The Act further requires all users of credit reports to provide notice to the affected consumer whenever they "take[] any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report," and to inform the consumer of the right to obtain a copy of the report and to challenge its content. 15 U.S.C. 1681m(a).

b. Congress created a federal cause of action for consumers against those who furnish credit information, or who create, market, or use credit reports in violation of

the FCRA. 15 U.S.C. 1681p (Supp. IV 2004).[1] Under 15 U.S.C. 1681*o* (2000 & Supp. IV 2004), "[a]ny person who is negligent in failing to comply with any requirement imposed under [the FCRA] with respect to any consumer" is liable for "actual damages sustained by the consumer as a result of the failure," as well as costs and attorney's fees. 15 U.S.C. 1681*o*(a) (2000 & Supp. IV 2004). If the failure to comply with a requirement of FCRA is "willful[]," the consumer may obtain (i) either actual damages or statutory damages "of not less than $100 and not more than $1,000," (ii) "such amount of punitive damages as the court may allow," and (iii) costs and attorney's fees. 15 U.S.C. 1681n(a)(1)(A)-(3).[2]

2. This case arises out of two separate proposed class actions against two different insurance companies for allegedly failing to comply with the FCRA's adverse-action notice requirements.

a. Respondent Edo applied to GEICO for automobile insurance.[3] GEICO relied on Edo's credit report to eval-

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[1] In 2003, Congress limited private enforcement of violations of Section 1681m. See 15 U.S.C. 1681m(h)(8) (Supp. IV 2004).

[2] Congress also established civil liability for specific instances of "knowing noncompliance," rendering any person "who obtains a consumer report from a consumer reporting agency under false pretenses or knowingly without a permissible purpose" liable to the consumer reporting agency for either actual damages or $1000 in statutory damages, "whichever is greater." 15 U.S.C. 1681n(b). Congress further directed that a "natural person" who obtains a consumer report from any source "under false pretenses or knowingly without a permissible purpose" is likewise liable for the greater of either actual damages or $1000. 15 U.S.C. 1681n(a)(1)(B).

[3] While the parties disputed below which (if any) of the GEICO and Safeco companies were proper defendants, petitioners do not press that argument here. Accordingly, this brief refers to the petitioners in No. 06-100 as "GEICO" and in No. 06-84 as "Safeco."

uate his application and, based in part on the report, offered Edo insurance at a higher premium rate than it offered to other applicants. 06-100 Pet. App. 39a.

Originally, GEICO provided adverse action notices to all customers whose initial insurance rates were based, at least in part, on adverse credit reports. 06-100 Pet. App. 12a. GEICO subsequently changed that policy and, instead, compared the rate an insured was offered to the rate he would have been offered if the credit report had been "neutral." *Ibid.* Where GEICO determined, as it did in Edo's case, that the rate would not have changed if it had applied a neutral credit score (or if it had not considered his credit score at all), GEICO did not issue an adverse action notice. *Id.* at 14a, 21a n.12. In 2002, GEICO abandoned that policy and resumed issuing adverse action notices "whenever a report with more favorable credit information would have resulted in a lower insurance rate." *Ibid.*

Edo filed a proposed class-action lawsuit against GEICO alleging that GEICO violated the FCRA by failing to provide him with an adverse action notice. The complaint sought statutory and punitive damages. 06-100 Pet. App. 9a. The district court granted GEICO's motion for summary judgment, *id.* at 37a-47a, holding that no adverse action occurred because Edo's insurance rate "would have been the same even if GEICO Indemnity did not consider information in [Edo's] consumer credit history." *Id.* at 46a.

b. Respondents Charles Burr and Shannon Massey purchased insurance policies from Safeco. Safeco relied on information in their consumer reports to set the initial premiums and, based on that information, charged them higher rates than it charged customers with better re-

ports. Safeco, however, did not issue Burr or Massey adverse action notices. 06-84 Pet. App. 4a-5a, 11a.

Burr and Massey subsequently joined as named plaintiffs in a proposed class-action lawsuit alleging that Safeco's failure to provide adverse action notices after setting higher insurance premiums based on their credit reports constituted a willful violation of the FCRA. 06-84 Pet. App. 24a. While they did not allege actual damages, Burr and Massey sought statutory and punitive damages. 06-84 Pet C.A. Supp. E.R. 3-4.

The district court granted Safeco's motion for summary judgment against Burr and Massey. 06-84 Pet. App. 3a-14a. The court held that the use of a credit report to set higher premiums for an initial application for insurance was not an "adverse action" because the FCRA requires an "increase in any charge for" insurance, 15 U.S.C. 1681a(k)(1)(B)(i), and such an increase could occur only if the "insurer charges an insured one price for insurance and then subsequently increases that charge." 06-84 Pet. App. 11a-12a.

3. The court of appeals reversed in both cases. 06-84 Pet. App. 1a-2a; 06-100 Pet. App. 1a-36a.

a. In respondent Edo's case, the court held that GEICO's use of his credit report to set his insurance rate constituted an "adverse action" under the FCRA, because the company relied on the report and, if Edo's credit rating had been better, he would have been charged a lower rate. 06-100 Pet. App. 20a-21a.

Addressing the standard for a willful violation of the FCRA, the Ninth Circuit agreed with the Third Circuit that a defendant acts "willfully" if it acts with either a conscious disregard of consumers' known rights under the FCRA or "reckless disregard of whether the policy [or action] contravened those rights." 06-100 Pet. App.

31a (quoting *Cushman* v. *Trans Union Corp.*, 115 F.3d 220, 227 (3d Cir. 1997)). The court further held that, under the reckless-disregard standard, a defendant will be liable if it relies "on creative lawyering that provides indefensible answers," "implausible interpretations," or "creative but unlikely answers to 'issues of first impression.'" *Id.* at 33a-34a. The court concluded that "at least some of the interpretations" in the case were "implausible," *id.* at 34a, and remanded to the district court for further proceedings. *Id.* at 36a.

b. In petitioner Safeco's case, the court of appeals reversed. 06-84 Pet. App. 1a-2a. Based on its decision in *Edo*, the court held that the FCRA's adverse action provision applies to increases in the charge for an initial policy of insurance, *id.* at 1a-2a, and that Safeco could be held to have acted willfully, *id.* at 2a.

SUMMARY OF ARGUMENT

I. Under the FCRA, a person willfully fails to comply with the law if he or she acts knowingly or in reckless disregard of the Act's requirements. For decades, this Court has repeatedly held that the term "willfully" in civil statutes encompasses not only knowing, but also reckless, disregard of the law or the rights of others. That familiar pattern includes statutes that were enacted contemporaneously with the FCRA and that share its focus on compliance with laws protecting federally created rights. In the absence of a contrary indication in the text—and there is none in the FCRA—this Court's settled practice is to assume that Congress hewed to that pattern, rather than departed anomalously from it. That ordinary reading of "willfully" also comports with the FCRA's structure, which separately carves out for more serious treatment certain violations committed "know-

ingly," a limitation that would be meaningless if "willfully" were already confined to violations of known legal standards.

While the court of appeals was correct to construe "willfully" as incorporating a reckless-disregard component, the court misdescribed and misapplied that standard. To establish reckless disregard in failing to comply with the law, a plaintiff must show more than an unreasonable, unlikely, or implausible construction of the law. The plaintiff must establish that the defendant acted either in disregard of known legal obligations or with indifference to an objectively high and obvious risk of unlawfulness. Reckless disregard, in other words, requires such an extreme departure from standards of ordinary care as either to be tantamount to acting knowingly or to reflect such disregard for the law as to merit equivalent censure.

II. The court of appeals correctly held that charging a customer a higher rate for insurance based on his credit report constitutes an adverse action. The FCRA defines "adverse action" to include "an increase in any charge for [insurance] * * * applied for" based on the content of a credit report. 15 U.S.C. 1681a(k)(1)(B)(i). That language readily encompasses charging an individual a higher rate than that given to customers with better credit reports, just as charging a higher premium based on a new applicant's other individual characteristics, such as age, gender, or a poor driving record, would naturally be described as an "increase" in the rate charged.

GEICO argues that no adverse action occurred because Edo would have received the same insurance rate if his credit report had not been used. But that is irrelevant. Edo's credit report was used, and GEICO charged

Edo a higher rate as a result. The rate he would have been charged if, contrary to fact, his report has not been consulted is beside the point. Insurers are not required to use credit reports, but when they choose to do so they must comply with Congress's calibrated scheme, which seeks to protect both consumers and the integrity and reliability of the Nation's credit and banking systems, and which makes providing consumers with notice of all adverse actions critical to accomplishing those goals.

While GEICO's construction of the adverse-action notice requirement was erroneous, the resulting failures to notify consumers were not willful violations of the FCRA. The legal question of the FCRA's coverage was one of first impression that was not settled by statutory text, formal agency guidance, or case law. GEICO's reading, while wrong, does not reflect the type of extreme departure from responsible judgment that amounts to reckless disregard of the law.

ARGUMENT

I. A "WILLFUL" FAILURE TO COMPLY WITH THE REQUIREMENTS OF THE FCRA REQUIRES PROOF THAT THE DEFENDANT EITHER KNOWINGLY OR RECKLESSLY DISREGARDED THE LAW

"[W]illfully" is "a word of many meanings," the construction of which "is often dependent on the context in which it appears." *Bryan* v. *United States*, 524 U.S. 184, 191 (1998) (quoting *Spies* v. *United States*, 317 U.S. 492, 497 (1943)).[4] When the word appears in criminal statutes, it generally refers to a "culpable state of mind,"

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[4] See *Ratzlaf* v. *United States*, 510 U.S. 135, 141 (1994); *United States* v. *Bishop*, 412 U.S. 346, 352 (1973); *Screws* v. *United States*, 325 U.S. 91, 101 (1945).

such as a "bad purpose" to violate the law, *Bryan*, 524 U.S. at 191 & n.12. By contrast, when (as here) "willfully" appears in a civil statute—particularly one that is designed to protect federal rights and that is framed in terms of the defendant's compliance with the law—the term means a knowing or reckless disregard of the law. "Recklessness," in turn, requires more than mere negligence. *McLaughlin* v. *Richland Shoe Co.*, 486 U.S. 128, 133 (1988). It imposes an objective standard that is satisfied only if the defendant acted in the face of such a high risk that its conduct would violate the law that the illegality was either known or so obvious as to require the exercise of greater care.

A. "Willfully" Is Traditionally Interpreted In Civil Statutes, Particularly Laws Designed To Enforce Federal Rights, To Mean Either Knowing Or Reckless Disregard Of Legal Obligations

Construing the word "willfully" in the FCRA to encompass both knowing and reckless disregard of the law "is surely a fair reading of the plain language of the Act." *Richland Shoe*, 486 U.S. at 133. More than a half-century ago, in *United States* v. *Illinois Central R.R.*, 303 U.S. 239 (1938), the Court approved the following "useful guide to the meaning of the word 'willfully'" in the civil context: "it means purposely or obstinately and is designed to describe the attitude of a [defendant], who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to [the statute's] requirements," *id.* at 243.

More recently, in *TWA, Inc.* v. *Thurston*, 469 U.S. 111 (1985), this Court held that liquidated damages for "willful violations" of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 601 *et seq.*, required proof

that the defendant "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." *Thurston*, 469 U.S. at 125-126; see *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 617 (1993) (same). The Court reached the same conclusion under the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 *et seq.* See *Richland Shoe*, 486 U.S. at 133.[5]

That generally established understanding of "willfully" in the civil context forms the backdrop against which Congress enacted the FCRA's willful liability provision, and thus the "absence of [any] contrary direction" in the statute evidences Congress's "satisfaction with [that] widely accepted definition[], not * * * a departure from [it]." *Morissette* v. *United States*, 342 U.S. 246, 263 (1952). That common-sense assumption has particular salience here, for two reasons.

First, when Congress's aim is to enforce federal rights and to induce regulated entities' attention and adherence to the obligations of federal law, Congress has a long tradition of employing the reckless-disregard standard to accomplish that end. In the FCRA, just like the FLSA and the ADEA, the object to which the willfulness standard refers is a defendant's failure to comply with the particular legal constraints imposed by the Act itself. Compare 15 U.S.C. 1681n(a), with 29 U.S.C. 255(a); 29

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[5] GEICO notes (06-100 Pet. 15) that *Richland Shoe* involved only a statute-of-limitations provision. There is no reason why that distinction should matter, however. Indeed, it was the established construction of the FLSA's criminal willfulness provision that provided the predicate for the Court's adoption of that recklessness standard. See *Richland Shoe*, 486 U.S. at 133; *Thurston*, 469 U.S. at 125-127. Moreover, the FLSA's civil penalty provision, 29 U.S.C. 216(e), accords "willfully" the same established meaning. See *Baystate Alternative Staffing, Inc.* v. *Herman*, 163 F.3d 668, 679-680 & n.14 (1st Cir. 1998).

U.S.C. 626(b).[6] It was in that context that this Court concluded in *Thurston* and *Richland Shoe* that willfulness encompasses a defendant's reckless disregard of the law. That same recklessness standard governs liability provisions in other federal laws, like (i) the Family and Medical Leave Act, 29 U.S.C. 2617(c)(2) (statute of limitations)[7]; (ii) the Occupational Safety and Health Act, 29 U.S.C. 666(a) (civil penalties)[8]; (iii) the Copyright Act, 17 U.S.C. 504(c)(2)[9]; and (iv) firearms licensing, 18 U.S.C. 923(e) (Supp. IV 2004).[10]

Congress similarly employed a standard of reckless disregard or reckless indifference to federal rights to enforce, through punitive damages, compliance with Title VII, 42 U.S.C. 2000e *et seq.*, and the Americans with Disabilities Act, 42 U.S.C. 12101 *et seq.* See 42 U.S.C. 1981a(b)(1); *Kolstad* v. *American Dental Ass'n*, 527 U.S.

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[6] That stands in distinction to willfulness standards that focus on conduct external to the statute. See, *e.g.*, Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* Oct. 12, 1929, art. 25(1), 49 Stat. 3020, 137 L.N.T.S. 27 ("willful misconduct"); 11 U.S.C. 523(a)(6) ("willful and malicious injury"); 38 U.S.C. 1110 ("willful misconduct").

[7] See *Porter* v. *New York Univ. Sch. of Law*, 392 F.3d 530, 531-532 (2d Cir. 2004); *Hanger* v. *Lake County*, 390 F.3d 579, 583-584 (8th Cir. 2004); *Hillstrom* v. *Best Western Hotel*, 354 F.3d 27, 33 (1st Cir. 2003).

[8] See, *e.g.*, *A.J. McNulty & Co.* v. *Secretary of Labor*, 283 F.3d 328, 337 (D.C. Cir. 2002); *Brock* v. *Morello Bros. Constr., Inc.*, 809 F.2d 161, 164 (1st Cir. 1987) (Breyer, J.).

[9] See, *e.g.*, *Island Software & Computer Serv., Inc.* v. *Microsoft Corp.*, 413 F.3d 257, 263 (2d Cir. 2005) (willfulness requires actual knowledge or "reckless disregard," or "willful blindness"); *In re Aimster Copyright Litigation*, 334 F.3d 643, 650 (7th Cir. 2003), cert. denied, 540 U.S. 1107 (2004).

[10] See *RSM, Inc.* v. *Herbert*, No. 06-1393, 2006 WL 3026344, at *5 (4th Cir. Oct. 26, 2006) ("deliberate disregard" or "plain indifference").

526, 535-538 (1999). That same standard has been employed to enforce constitutional and civil rights generally under 42 U.S.C. 1983. See *Smith* v. *Wade*, 461 U.S. 30, 51 (1983) ("adopt[ing]" for Section 1983 "the policy judgment of the common law—that reckless or callous disregard for the plaintiff's rights * * * should be sufficient to trigger a jury's consideration of the appropriateness of punitive damages").

Second, the FCRA was enacted in 1970, contemporaneously with other statutes in which "willfully" has been held to encompass reckless disregard. The ADEA was enacted in 1967, see Pub. L. No. 90-202, 81 Stat. 602, while the FLSA provision at issue in *Richland Shoe* was enacted in 1966, Pub. L. No. 89-601, § 601(b), 80 Stat. 844. There is no sound basis for holding that the meaning of "willfully" in civil statutes deviated dramatically before 1970. See *Dixon* v. *United States*, 126 S. Ct. 2437, 2445 (2006) (courts must construe a statutory term in a liability provision "as Congress may have contemplated it" at the time of enactment).

Accordingly, giving "willfully" in the FCRA's civil liability provision the same established meaning that the term signifies in substantively analogous and contemporaneously enacted statutes would be consistent with Congress's general practice of employing a "reckless disregard" standard to enforce compliance with federal law and to induce solicitude for federally created rights.[11]

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[11] Safeco argues (Pet. 20) that *Thurston* and *Richland Shoe* are distinguishable because the "willful" provisions in the ADEA and the FLSA were enacted "against the backdrop of consistent circuit precedent interpreting the term 'willful' to include 'reckless disregard.'" But that circuit precedent merely reflected this Court's repeated decisions construing "willful" to include a reckless-disregard component. See *Thurston*, 469 U.S. at 126 ("The definition of 'willful'

B. The Structure Of The Fair Credit Reporting Act Demonstrates That "Willfully" Includes Both Knowing And Reckless Disregard Of The Law

Petitioners' argument (06-84 Pet. 28; 06-100 Pet. 21-24) that willfulness requires actual knowledge of the violation of federal law not only overlooks established usage of the term in civil statutes, but also fails to comport with the overall structure and design of the FCRA.

First, when Congress wanted to restrict liability to knowing violations of the FCRA, it said so explicitly. Section 1681n(a)(1)(B) explicitly identifies and targets for separate treatment a specialized subset of violators within the general category of willful violations of the FCRA: those defendants who violate 15 U.S.C. 1681b(f) by obtaining a credit report either "under false pretenses" or "knowingly without a permissible purpose." 15 U.S.C. 1681n(a)(1)(B). If the word "willfully" in the overarching civil-liability subsection (15 U.S.C. 1681n(a)) already restricted the scope of that provision to "knowing" violations of the law, there would have been no reason for Congress to repeat that "knowingly" limitation in subparagraph (1)(B). This Court does not generally construe statutory terms in a manner that leaves them "with no job to do." *Doe* v. *Chao*, 540 U.S. 614, 623 (2004). Congress also increased the minimum statutory damages for such violators to no less than $1000, 15 U.S.C.

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adopted by the above cited courts [of appeals] is consistent with the manner in which this Court has interpreted the term in other criminal and civil statutes."); see also *id.* at 126-127. Indeed, that meaning was so well settled that the *Richland Shoe* Court *rejected* a contrary standard that had, in fact, been "widely used for a number of years" by courts of appeals, 486 U.S. at 133, because that reading was contrary to the "plain language of the statute," which dictated a knowing or reckless-disregard standard, *id.* at 134.

1681n(a)(1)(B), which underscores that Congress considered the conduct more culpable than the "willful" violations covered by the rest of the provision—such as obtaining a report with reckless disregard of the impermissibility of the purpose, which would render the person liable under Section 1681n(a)(1)(A) for a willful violation of Section 1681b(f).

Likewise, in Section 1681n(b), Congress created a cause of action for consumer reporting agencies (as opposed to consumers) that is limited to actions taken under false pretenses or "knowingly without a permissible purpose." 15 U.S.C. 1681n(b). Congress subtitled that provision "Civil liability for knowing noncompliance," in contrast to Section 1681n's general caption of "Civil liability for willful noncompliance." If willfulness were already limited to knowing violations, there would have been no reason for Congress to separate out structurally those violations that require a knowing violation of the FCRA. See also 15 U.S.C. 1681s(a)(2)(A) (civil liability actions by the Commission require a "knowing violation" of the FCRA). The plain import of Congress's language and structure thus confirms what the ordinary understanding of the text says—liability for "willful" violations reaches further than just knowing violations of the law and includes conduct in reckless disregard of the FCRA's requirements.

Second, Congress's deliberate use of different *mens rea* phraseology in the FCRA's criminal prohibitions underscores Congress's sensitivity to the distinct usages of "willfully" in civil and criminal law. In 15 U.S.C. 1681q and 1681r respectively, Congress criminalized the obtaining of credit reports under false pretenses and the unauthorized disclosure of consumer information when done "knowingly and willfully." Together, those terms

are understood to mean a conscious and intentional violation of a statute, *Black's Law Dictionary* 1012 (rev. 4th ed. 1968), and suggest a "bad purpose" component to "willfully" that is consonant with its traditional usage in criminal statutes, see *Bryan*, 524 U.S. at 191 & n.12; see also *United States* v. *Murdock*, 290 U.S. 389, 395 (1933), overruled in other part, *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52 (1964).[12]

Petitioners, however, propound a reading of "willfully" that leaves little, if any, room between Congress's differently articulated criminal and civil provisions. See 06-84 Pet. 18 (requiring an "intentional refusal to abide by known legal requirements"); *id.* at 28; 06-100 Pet. 21. This Court should "refrain from concluding here that the differing language in the two subsections has the same meaning in each," especially when it would have the effect of equating the higher *mens rea* of the criminal prohibitions with the requirements of the distinctly worded civil provisions. *Russello* v. *United States*, 464 U.S. 16, 23 (1983).

Third, petitioners' reading of "willfully" leaves no natural home in the structure of the liability provisions for reckless disregard of the FCRA's requirements. The FCRA authorizes civil damages actions for "willful noncompliance," 15 U.S.C. 1681n, and "negligent noncompliance," 15 U.S.C. 1681o (2000 & Supp. IV 2004). As between the two, the more natural and traditional home for liability based on reckless disregard is the willfulness

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[12] Tellingly, even in the criminal context, "willfully" has been understood to include reckless disregard of the law or the rights of others. See, *e.g.*, *Thurston*, 469 U.S. at 125-126 (equating its "reckless disregard" standard with the standard for establishing criminal liability under the FLSA).

provision. See *Hazen Paper*, *supra*; *Richland Shoe*, *supra*; *Thurston*, *supra*.

Furthermore, as petitioners note (06-84 Pet. 20-21; 06-100 Pet. 22), Congress considered and rejected a provision that would have made "gross negligence," rather than negligence, the standard for obtaining actual damages. As passed by the Senate, the predecessor bill to the FCRA dichotomized civil liability into "willful noncompliance" and "grossly negligent non-compliance." S. 823, 91st Cong., 1st Sess. § 617 (1969); see S. Rep. No. 517, *supra*, at 7. In the Conference Committee, the latter standard was lowered to mere negligence. H.R. Conf. Rep. No. 1587, 91st Cong., 2d Sess. 30 (1970).

Equating "gross negligence" with reckless disregard (06-84 Pet. 20; 06-100 Pet. 22), petitioners contend that Congress must have intended that the willfulness provision not extend to grossly negligent conduct. But "most courts consider that 'gross negligence' falls short of a reckless disregard of consequences," W. Prosser, *The Law of Torts* § 34, at 183 (4th ed. 1971), so the failure to incorporate a gross negligence standard into Section 1681*o* sheds little light on Congress's views regarding recklessness. Moreover, it is highly doubtful that the same Members of Congress who rejected "gross negligence" as too high a threshold for actual damages simultaneously concluded that the threshold for the further remedies of statutory and punitive damages should be as high as knowing conduct, and not reckless disregard. Petitioners' reading of the FCRA's text and legislative history is not only counterintuitive, but also would leave "reckless disregard" of the FCRA's terms a statutory orphan—a standard of culpability that sets too high a bar to fit logically within the Act's negligent non-compliance

provision and too low a bar to fall within the willful noncompliance provision.[13]

Fourth, petitioners argue (06-84 Pet. 23-24; 06-100 Pet. 15, 17) that "recklessness disregard" sets too low a threshold for punitive damages. But reckless disregard or indifference to federal rights is an established standard for punitive damages liability and a familiar one to businesses, including those involved in consumer reporting, see *Dun & Bradstreet, Inc.*, v. *Greenmoss Builders, Inc.*, 472 U.S. 749, 751, 760-763 (1985) (plurality opinion) (credit reporting agencies favor a reckless-disregard standard). Indeed, a number of State consumer-reporting laws appear to impose the same or a similar standard for punitive damages, so it is a standard with which petitioners are already familiar when using consumer reports.[14]

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[13] Petitioners argue that Congress actually "consider[ed]" versions of the liability provision that would have allowed actual and punitive damages for "willful or grossly negligent" violations. See 06-100 Pet. 22 (emphasis omitted); see also 06-84 Pet. 21. That is a generous reading of the legislative history. The two House bills to which they refer never received a single day of debate or hearings, and never made it out of Committee, let alone the House. See H.R. 19403, § 52, 91st Cong., 2d Sess. (Sept. 22, 1970); H.R. 19410, § 52, 91st Cong., 2d Sess. (Sept. 22, 1970). Furthermore, even if a handful of Representatives were aware of that language, their failure to press for its enactment may well have reflected their concurrence with this Court's view that the "gross negligence" standard is "too vague, and too likely to be confused with mere ordinary negligence, to provide a fair standard" for punitive damages. *Smith*, 461 U.S. at 43; see *id.* at 49; *Farmer* v. *Brennan*, 511 U.S. 825, 836 n.4 (1994).

[14] See Cal. Civ. Code § 1785.20 (West 1998); *id.* §§ 1785.31, 1786.40 (West Supp. 2006); *Simms* v. *Royal Thrift & Loan Co.*, No. E028659, 2002 WL 32576, at *6 (Cal. Ct. App. Jan. 11, 2002) (unpub.) (violation is "willful" if "the defendant knowingly failed to fulfill an obligation without a good faith, reasonable belief in the legality of his or her

In addition, petitioners are already subject to punitive damages if they recklessly disregard the requirements of Title VII or the Americans with Disabilities Act. See 42 U.S.C. 1981a; *Kolstad*, *supra*. Reckless disregard is also the standard courts apply under the ADEA for liquidated damages, which are "punitive in nature,"

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actions"); Ariz. Rev. Stat. Ann. § 44-1695(C) (West 2003) ("grossly negligent"); *Armenta* v. *City of Casa Grande*, 71 P.3d 359, 364 (Ariz. Ct. App. 2003) (defining "[g]ross, willful, or wanton conduct" generally as "action or inaction with reckless indifference to the result or the rights or safety of others"); Kan. Stat. Ann. §§ 50-714, 50-715 (1994); *Reeves* v. *Carlson*, 969 P.2d 252, 256-257 (Kan. 1998) (in tort law, "willful" means a person has "knowledge of existing conditions and [is] aware * * * that [harm] will likely or probably result from his or her conduct, and with reckless indifference to the consequences, consciously does some act or omits to discharge some duty, which produces the injurious result"); Me. Rev. Stat. Ann. title 10, § 1320 (West Supp. 2005); *id.* § 1322 (West 1997); *Shrader-Miller* v. *Miller*, 855 A.2d 1139, 1144 (Me. 2004) (In tort law, "willfully" "mean[s] conduct displaying an 'utter and complete indifference to and disregard for the rights of others.'"); Md. Code Ann. Com. Law § 14-1212 (LexisNexis 2005); *id.* § 14-1213 (Supp. 2006); *Williams Constr. Co.* v. *Garrison*, 400 A.2d 22, 25 (Md. Ct. Spec. App. 1979) ("willful[ness] in worker's compensation law includes "the intentional doing of something * * * with a wanton and reckless disregard of its probable consequences"); Mont. Code Ann. §§ 31-3-131, 31-3-142, 33-18-608 (2005); *Cooper* v. *Rosston*, 756 P.2d 1125, 1130 (Mont. 1988) ("When a person knows or has reason to know facts which create a high degree of risk of harm to the substantial interests of another, and * * * recklessly proceeds in unreasonable disregard of or indifference to that risk, his conduct meets the standard of willful, wanton, and/or reckless to which the law of this State will allow imposition of punitive damages."); N.Y. Gen. Bus. Law. § 380-i (McKinney 1996); *id.* § 380-*l* (Supp. 2006); *Welch* v. *Mr. Christmas Inc.*, 440 N.E.2d 1317, 1321 (N.Y. 1982) ("[R]ecovery of exemplary or punitive damages in a common-law action requires a showing of conscious disregard of the rights of others or conduct so reckless as to amount to such disregard."); see generally Restatement (Second) of Torts § 908(2) (1979).

Thurston, 469 U.S. at 125, under the Equal Credit Opportunity Act, 15 U.S.C. 1691e(b), and under a number of other federal laws.[15] Indeed, reckless disregard has already been determined to be an adequate shield even in areas of First Amendment concern, see *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 349 (1974).[16]

Finally, the question of how the FCRA responds to covered entities who recklessly disregard the statute's requirements is, at bottom, a question about Congress's level of tolerance for reckless disregard of the law. The FCRA is designed to protect individuals from abuse, to enhance individual privacy, and to promote integrity,

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[15] See, *e.g.*, *Barbour* v. *Merrill*, 48 F.3d 1270, 1277 (D.C. Cir. 1995) (42 U.S.C. 1981), cert. dismissed, 516 U.S. 1155 (1996); *Ragin* v. *Harry Macklowe Real Estate Co.*, 6 F.3d 898, 909 (2d Cir. 1993) (Fair Housing Act, 42 U.S.C. 3601 *et seq.*); *United States* v. *Balistrieri*, 981 F.2d 916, 936 (7th Cir. 1992) (Fair Housing Act), cert. denied, 510 U.S. 812 (1993); *Asbury* v. *Brougham*, 866 F.2d 1276, 1282 (10th Cir. 1989) (42 U.S.C. 1982); *Stephens* v. *South Atl. Canners, Inc.*, 848 F.2d 484, 489-490, 492 & n.6 (4th Cir.) (42 U.S.C. 1981), cert. denied, 488 U.S. 996 (1988); *Williamson* v. *Handy Button Mach. Co.*, 817 F.2d 1290, 1296 (7th Cir. 1987) (42 U.S.C. 1981); *Fischl* v. *General Motors Acceptance Corp.*, 708 F.2d 143, 148 (5th Cir. 1983) (Equal Credit Opportunity Act).

[16] Petitioner Safeco contends (06-84 Pet. 21) that Congress "implicitly endorse[d]" reading "willfully" to mean knowing violations of the law when it amended the FCRA in 1996 without changing the legal standard. There is nothing in the legislative history that supports that conclusion or, more particularly, that suggests that Congress understood the circuits' "conscious disregard" standard to exclude reckless disregard. Indeed, both the Third and Ninth Circuits have included "reckless disregard" within a "conscious disregard" standard, see 06-84 Pet. App. 127a; *Cushman*, 115 F.3d at 226-227, and other courts have used the phrases interchangeably in this context, see *Casella* v. *Equifax Credit Info. Servs.*, 56 F.3d 469, 476 (2d Cir. 1995), cert. denied, 517 U.S. 1150 (1996), and elsewhere, see, *e.g.*, *Bevolo* v. *Carter*, 447 F.3d 979, 982-984 (7th Cir. 2006); *Stuart* v. *United States*, 337 F.3d 31, 36 (1st Cir. 2003); *United States* v. *Gonsalves*, 435 F.3d 64, 70 (1st Cir. 2006).

efficiency, and reliability in the Nation's banking system. See 15 U.S.C. 1681(a)(1), (4) and (b). In the face of those critical interests, petitioners posit a statutory scheme that cares sufficiently little about non-compliance and the harms that it can cause as to treat ordinary negligence and heedless disregard of the law with equivalent censure. But the FCRA demands, as its starting point, that regulated entities take reasonable measures and strike reasonable balances in exercising their "grave responsibilities," 15 U.S.C. 1681(a)(4) and (b), purposes that cannot be reconciled with petitioners' proposed environment of broad tolerance for companies' reckless indifference to harm and failure to exercise even slight care in complying with the law.

C. Reckless Disregard Requires Indifference To Clearly Established Law Or The Disregard Of An Obvious And High Probability That Conduct Is Unlawful

While the court of appeals correctly held that "willfully" in the FCRA includes a reckless-disregard component, the court misconceived the import of that standard and misapplied it in these cases. For example, the court of appeals held that "implausible" interpretations (06-100 Pet. App. 34a) or knowing reliance on legal opinions "that provide creative but unlikely answers to 'issues of first impression'" (*id.* at 33a) constitute reckless disregard. The court further noted (*id.* at 34a) that whether consultation with attorneys would provide evidence of a lack of willfulness would depend upon the "unreasonableness" of the erroneous interpretation. That resembles a mere negligence standard, and thus sets too low a bar. See *Richland Shoe*, 486 U.S. at 134-135 & n.13.

To be sure, "the term recklessness is not self-defining," *Farmer* v. *Brennan*, 511 U.S. 825, 836 (1994), nor

capable of being cabined into "one infallible definition," *St. Amant* v. *Thompson*, 390 U.S. 727, 730 (1968). "Inevitably its outer limits will be marked out through case-by-case adjudication, as is true for so many legal standards." *Id.* at 730-731. Nevertheless, there are two essential aspects of "reckless disregard" in the civil context that should have guided the court's application.

First, recklessness bespeaks an aggravated or extreme departure from standards of ordinary care. In contrast to negligence, recklessness entails action or inaction "in the face of an *unjustifiably high risk* of harm" or unlawfulness, *Farmer*, 511 U.S. at 836 (emphasis added). The probability that harm or a violation of the law will result must be apparent to a "high degree." *Harte-Hanks Commc'ns, Inc.* v. *Connaughton*, 491 U.S. 657, 667 (1989). Accordingly, "[t]he usual meaning assigned to * * * 'reckless' * * * is that the actor has intentionally done an act of an unreasonable character in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm [or illegality] would follow." Prosser, *supra*, § 34, at 185; see *Farmer*, 511 U.S. at 837.

Proof of such an aggravated deviation from the standard of ordinary care is necessary because "reckless disregard" is designed to capture two acute forms of culpability. The reckless-disregard standard reaches conduct that is so wrongful under the circumstances that it is a proxy for or functionally equivalent to knowing or intentional conduct, which can in some contexts be difficult to prove.[17] But when couched (as in the FCRA) in terms of

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[17] See, *e.g.*, *Barry* v. *Edmunds*, 116 U.S. 550, 563 (1886) (standard captures that "reckless indifference to the rights of others which is

reckless disregard of the law, the recklessness standard also captures failures to conform behavior to the law that are so extreme as to independently merit censure.[18]

Second, reckless disregard in the civil context is, at bottom, an objective standard. See *Farmer*, 511 U.S. at 836-837; Prosser, *supra*, § 34 at 185 ("an objective standard must of necessity in practice be applied"). That is even more true when, as here, the recklessness standard is framed in terms of compliance with the law, and the statutory standard itself is not necessarily well-established. Although inquiries into recklessness often take place in areas of well-established duties of care, in the statutory context, when the concern is whether the disregard of the law was reckless, the extent to which the law was well-established and clearly understood must be part of the analysis. Therefore, courts must undertake an objective inquiry to determine whether the defendant's conduct reflected a colorable interpretation of the law. But because the standard is recklessness, not negligence, more than mere unreasonableness or implausibility must be shown. See *Richland Shoe*, 486 U.S. at 134-135 & n.13. The plaintiff must demonstrate either that the legal position ran afoul of clearly established law or that

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equivalent to an intentional violation of them"); *Saba* v. *Compagnie Nationale Air France*, 78 F.3d 664, 667-668 (D.C. Cir. 1996) (in some statutes, reckless disregard "provid[es] a proxy" for knowing or intentional conduct, while "alleviat[ing] problems of proof").

[18] See, *e.g.*, *Illinois Cent.*, 303 U.S. at 243 (willfulness encompasses actions that either "intentionally disregard[] the statute or [are] plainly indifferent to its requirements"); *Brock*, 809 F.2d at 164 (in civil cases, a person acts willfully if "the offender shows 'indifference' to the rules; he need not be consciously aware that the conduct is forbidden at the time he performs it, but his state of mind must be such that, if he were informed of the rule, he would not care").

the defendant failed to act with necessary care in the face of a high and obvious risk of legal error. In other words, the defendant's determination of his legal obligations must be shown to have fallen outside the range of responsible judgment.[19] The reckless-disregard component of willfulness thus requires violation of clearly established law or indifference to an objectively high and obvious risk of unlawfulness.[20]

That purely legal inquiry into the objective recklessness of the defendant's failure to comply with the FCRA can, and generally should, be undertaken at an early stage in the case. Only if the defendant's failure to comply with the law was objectively reckless would it become necessary for a court to probe, as the court of appeals invited here (06-100 Pet. App. 33a-34a), the defendant's subjective good faith. Resolving the objective recklessness of the defendant's non-compliance with the law at the outset will (i) help to develop the contours of FCRA law, thereby providing prospective guidance concerning the law's requirements and reducing violations; (ii) "permit the resolution of many insubstantial claims on summary judgment," *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982); and (iii) minimize the significant intrusions on attorney-client privilege that often attend inquiries into

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[19] In that respect, the test is similar to the qualified-immunity inquiry into whether a defendant's conduct violated "clearly established law." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). Indeed, this Court has acknowledged the overlap of the qualified-immunity inquiry and the "reckless disregard" standard. See *Smith*, 461 U.S. at 51-54.

[20] Cf. *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60 (1993) (to overcome *Noerr-Pennington* immunity in antitrust law, the defendant's litigation position must have been "objectively baseless" and "objectively meritless").

subjective good faith compliance with the law, see 06-100 Pet. App. 34a.

The court of appeals deviated substantially from that framework. The court gave improper significance to allegedly improper motivations at the outset, 06-100 Pet. App. 33a, and inappropriately collapsed the objective and subjective components of recklessness into a single inquiry, inviting immediate inquiry on remand into the privileged advice of counsel, *id.* at 34a. The court also applied too diluted a standard for recklessness, suggesting that it can be satisfied by "unreasonableness," "unlikely answers," or "implausible interpretations," *id.* at 33a-34a. Because the court concluded that "at least some of the [defendants'] interpretations are implausible," and hence reckless under the court's analysis, and because the court ordered the case remanded for further proceedings "consistent with [its] opinion" setting forth an incorrect articulation of the governing recklessness standard (*id.* at 34a, 36a; see 06-84 Pet. App. 2a), the court's judgments cannot stand.

II. AN ADVERSE ACTION NOTICE IS REQUIRED WHEN THE CONTENT OF A CONSUMER'S CREDIT REPORT PREVENTED THE CONSUMER FROM OBTAINING A BETTER INSURANCE RATE

A. Providing A Higher Insurance Rate Based, In Part, On A Credit Report Constitutes An Adverse Action

The court of appeals correctly concluded in No. 06-100 (Pet. App. 20a-21a) that GEICO took an adverse action against Edo. The FCRA defines an adverse action in the insurance context as:

> a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable

> change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance.

15 U.S.C. 1681a(k)(1)(B)(i).[21]

GEICO concedes (06-100 Pet. App. 10a) that charging a new customer a higher rate than that available to other customers based, at least in part, on the customer's credit report can constitute an "increase in a[] charge for [insurance] * * * applied for," 15 U.S.C. 1681a(k)(1)(B)(i), and thus an adverse action. That concession was a wise one. The plain meaning of "increase" is "to become" or "to make" "greater in some respect." *Webster's Third New Int'l Dictionary* 1145 (1961); see *Webster's New Int'l Dictionary* 1260 (2d ed. 1958). When an insurer charges one new customer more than others based, at least in part, on the content of the customer's credit report, it requires no linguistic leaps to conclude that the insurer has "increase[d]" the insurance charge for that customer.

Nothing in the meaning or usage of that term in the FCRA presupposes that the baseline for determining whether a rate is greater must be a price previously paid by the same customer himself, as opposed to the price offered to others.[22] The FCRA's prohibitions are not

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[21] The FCRA defines "adverse action" differently depending on the type of transaction involved (*i.e.*, insurance, credit, employment, or licensing). See 15 U.S.C. 1681a(k)(1). This case concerns only the insurance provision.

[22] See 16 C.F.R. Pt. 600 App., at 519 (notice required if any adverse action is taken, even if the information is non-derogatory); 16 C.F.R. Pt. 698 App. H, at 552 (Notice of User Responsibilities) ("'adverse action' is defined very broadly" and includes any decision "hav[ing] a negative impact"); S. Rep. No. 209, 103d Cong., 1st Sess. 4, 8 (1993) (adverse action notice required "any time the permissible use of a report results

limited to repeat customers. Nor is such a reading required by common usage. Had Edo pulled into a gas station and been charged ten cents a gallon more because of his race, gender, or the fact that his license plate ended in an odd, rather than an even, number, Edo would have suffered an "increase[d]" charge for gasoline, regardless of whether he had ever purchased gasoline at that station before. See *Cornist* v. *B.J.T. Auto Sales, Inc.*, 272 F.3d 322, 327 (6th Cir. 2001) (a charge imposed on credit purchasers of new cars was an "increase" over the price charged to cash customers).

GEICO argues (06-100 Pet. 25-29) that no adverse action occurred because it determined after the fact that Edo's rate would have been the same if no credit report had been requested and GEICO had instead applied a neutral credit score. GEICO does not dispute, however, that it, in fact, obtained and used Edo's actual credit score and, on that basis, charged him a higher rate for insurance than what was offered to certain other customers and what would have been offered to him if his credit score had been better. 06-100 Pet. App. 11a-12a, 14a. What GEICO *would have done* in the absence of a credit report is beside the point, because what GEICO *did*—use a credit report adversely without providing notice—violated the statute.[23]

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in an outcome adverse to the interests of the consumer"); H.R. Rep. No. 486, 103d Cong., 2d Sess. 26 (1994) (same); S. Rep. No. 517, *supra*, at 7 (adverse action notice required whenever a consumer is "charged a higher rate for * * * insurance" because of his credit report).

[23] Indeed, had GEICO not intended to use Edo's report in connection with the underwriting of insurance, such as to set his insurance rate, it would have obtained the report without any permissible purpose, in violation of 15 U.S.C. 1681b(a) (Supp. IV 2004).

Nothing in the FCRA conditions the existence of an adverse action on the absence of *post hoc* rationales for the higher rate. By the statute's plain terms, an "adverse action" requires nothing more than that the insurance company "take[] any adverse action," 15 U.S.C. 1681m(a)—such as an "increase" in the charge for insurance, 15 U.S.C. 1681a(k)(1)(B)(i)—"based in whole or in part on any information contained in a consumer report." 15 U.S.C. 1681m(a). If it does, an adverse action notice is required. *Ibid.* Properly understood, therefore, the adverse action occurred and was completed the moment Edo's insurance rate was set at a higher and less-preferable level based, at least in part, on his credit report—and, at that point, the obligation to issue an adverse-action notice was triggered. See *TRW*, 534 U.S. at 35 (under the FCRA, "[p]unitive damages * * * could presumably be awarded at the moment of TRW's alleged wrongdoing," regardless of whether and when actual damages might be established); cf. *McKennon* v. *Nashville Banner Publ'g Co.*, 513 U.S. 352, 357 (1995).

Indeed, GEICO's position defies the statutory text and purpose. The FCRA's definition of an adverse action focuses on whether the credit report had a negative effect on Edo's insurance rate, not whether his rate nevertheless fell within some statistical median or "neutral" insurance rate for customers of similar backgrounds. GEICO's after-the-fact evidence may speak to whether actual damages accrue, *McKennon*, 513 U.S. at 360-362, but it says nothing about whether an adverse action was, in fact, taken based on his credit report.

Furthermore, the purpose of the adverse action notice is not to alert consumers only when a report is below average; it is to advise any affected consumer that the information in his report is not as good as it might be and

that the deficiency has had material consequence. Under the FCRA, each consumer plays a pivotal role in assuring the accuracy of his or her consumer report and thereby contributes to the integrity of the system as a whole. See *Philbin* v. *Trans Union Corp.*, 101 F.3d 957, 962 (3d Cir. 1996) (noting "the detrimental effects inaccurate information can visit upon both the individual consumer and the nation's economy as a whole"). It is the adverse action notice that generally triggers the consumer's role. In the absence of such notice, there may be nothing to alert the consumer to check the report and no information as to how to check a report. A consumer with perfect credit who should receive a discount, but instead is charged a higher rate based on a mistaken report that her credit is average is no less entitled to notice than a consumer with average credit who is charged a higher-than-average rate based on a mistaken report of a poor credit history.

Moreover, the obligation to provide notice is a consequence GEICO chose for itself. Nothing in federal law requires insurance companies to use credit reports in setting their rates. The FCRA simply requires that, if an insurance company opts to use the credit reporting system and enjoy its benefits, it must also comply with the FCRA's obligations. That ensures that the other side of the balance—the consumer's interest in being alerted when his credit rating denies him a benefit and the financial system's interest in ensuring the accuracy and integrity of consumer information—is maintained.

Safeco's and GEICO's concerns (06-84 Pet. 24; 06-100 Pet. 25-29) about the policy implications of applying the adverse action definition as it is written are neither well-founded nor properly directed. For the past four years, GEICO has been providing the requisite notices, without

any evidence of paralysis or unworkability induced by its compliance with the FCRA. 06-100 Pet. App. 14a. And in any event, petitioners could avoid the FCRA's obligations by not relying upon credit reports. Beyond that, objections to the requirements of the FCRA should be directed to Congress.

B. GEICO's Erroneous Understanding Of The Adverse Action Provision Was Not Willful

While GEICO erred in concluding that no adverse action report was required in Edo's situation, the district court's grant of summary judgment was proper because GEICO's departure from the FCRA's terms was not objectively reckless. The question whether an "increase[d]" charge can be made for any initial application for insurance was itself an issue of first impression, 06-100 Pet. App. 17a, and the legal novelty of that question was compounded in Edo's case because there was an alternative justification for the rate.

In addition, the statutory text is not so pellucid on the question as to render GEICO's position an extreme departure from the bounds of responsible judgment, as evidenced by the district court's judgment in GEICO's favor (06-100 Pet. App. 46a). See *id.* at 38a n.1 (describing GEICO's arguments as "well-reasoned and thoughtful"). Generally, "[i]f judges * * * disagree on a [legal] question, it is unfair to subject [defendants] to money damages for picking the losing side of the controversy." *Wilson* v. *Layne*, 526 U.S. 603, 618 (1999). Nor had the Commission provided specific formal guidance on the question. Cf. *Thurston*, 469 U.S. at 129-130 (airlines' position not reckless where legal advice was sought and

position was within the range of reason).[24] Nothing in the statute's text, its established interpretation, agency guidance, court decisions, or the facts of the situation made it apparent that there was an objectively high risk that GEICO's construction of the law was wrong. As a result, GEICO's position did not reflect such an extreme departure from the range of responsible judgment as to be either tantamount to a knowing violation of the law or to reflect such heedless disregard of its duty to comply with the law as to be commensurately culpable.

CONCLUSION

The judgment of the court of appeals in No. 06-84 should be vacated and remanded, and the judgment in No. 06-100 should be reversed.

Respectfully submitted.

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[24] Commission staff had provided informal guidance advising that denying a new customer a better insurance rate wholly or partly because of information in the customer's credit report is an adverse action. See Letter from Hannah Stires, FTC, to James Ball (Mar. 1, 2000) <http://www.ftc.gov/os/statutes/fcra/ball.htm>.

APPENDIX

The following Sections are found in Title 15 of the United States Code.

§ 1681. Congressional findings and statement of purpose

(a) Accuracy and fairness of credit reporting

The Congress makes the following findings:

(1) The banking system is dependent upon fair and accurate credit reporting. Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system.

(2) An elaborate mechanism has been developed for investigating and evaluating the credit worthiness, credit standing, credit capacity, character, and general reputation of consumers.

(3) Consumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers.

(4) There is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy.

(b) Reasonable procedures.

It is the purpose of this title to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard

to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this title.

§ 1681a. Definitions; rules of construction

(a) Definitions and rules of construction set forth in this section are applicable for the purposes of this subchapter.

(b) The term "person" means any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity.

(c) The term "consumer" means an individual.

(d) Consumer report.—

(1) IN GENERAL.—The term "consumer report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness,[1] credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for—

(A) credit or insurance to be used primarily for personal, family, or household purposes;

(B) employment purposes; or

(C) any other purpose authorized under section 1681b of this title.

* * * * *

[1] So in original. Probably should be "creditworthiness,".

(k) ADVERSE ACTION.—

(1) ACTIONS INCLUDED.—The term "adverse action"—

(A) has the same meaning as in section 1691(d)(6) of this title; and

(B) means—

(i) a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance;

(ii) a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee;

(iii) a denial or cancellation of, an increase in any charge for, or any other adverse or unfavorable change in the terms of, any license or benefit described in section 1681b(a)(3)(D) of this title; and

(iv) an action taken or determination that is—

(I) made in connection with an application that was made by, or a transaction that was initiated by, any consumer, or in connection with a review of an account under section 1681b(a)(3)(F)(ii) of this title; and

(II) adverse to the interests of the consumer.

(2) APPLICABLE FINDINGS, DECISIONS, COMMENTARY, AND ORDERS.—For purposes of any determination of whether an action is an adverse action under paragraph (1)(A), all appropriate final findings, decisions, commentary, and orders issued under section 1691(d)(6) of this title by the Board of Governors of the Federal Reserve System or any court shall apply.

* * * * *

§1681b. Permissible purposes of consumer reports

(a) In general

Subject to subsection (c) of this section, any consumer reporting agency may furnish a consumer report under the following circumstances and no other:

(1) In response to the order of a court having jurisdiction to issue such an order, or a subpoena issued in connection with proceedings before a Federal grand jury.

(2) In accordance with the written instructions of the consumer to whom it relates.

(3) To a person which it has reason to believe—

(A) intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or

(B) intends to use the information for employment purposes; or

(C) intends to use the information in connection with the underwriting of insurance involving the consumer; or

(D) intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or

(E) intends to use the information, as a potential investor or servicer, or current insurer, in connection with a valuation of, or an assessment of the credit or prepayment risks associated with, an existing credit obligation; or

(F) otherwise has a legitimate business need for the information—

(i) in connection with a business transaction that is initiated by the consumer; or

(ii) to review an account to determine whether the consumer continues to meet the terms of the account.

(4) In response to a request by the head of a State or local child support enforcement agency (or a State or local government official authorized by the head of such an agency), if the person making the request certifies to the consumer reporting agency that—

(A) the consumer report is needed for the purpose of establishing an individual's capacity to make child support payments or determining the appropriate level of such payments;

(B) the paternity of the consumer for the child to which the obligation relates has been established or acknowledged by the consumer in accordance with State laws under which the obligation arises (if required by those laws);

(C) the person has provided at least 10 days' prior notice to the consumer whose report is requested, by certified or registered mail to the last known address of the consumer, that the report will be requested; and

(D) the consumer report will be kept confidential, will be used solely for a purpose described in subparagraph (A), and will not be used in connection with any other civil, administrative, or criminal proceeding, or for any other purpose.

(5) To an agency administering a State plan under Section 454 of the Social Security Act (42 U.S.C. § 654) for use to set an initial or modified child support award.

* * * * *

§ 1681m. Requirements on users of consumer reports

(a) Duties of users taking adverse actions on basis of information contained in consumer reports

If any person takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report, the person shall—

(1) provide oral, written, or electronic notice of the adverse action to the consumer;

(2) provide to the consumer orally, in writing, or electronically—

(A) the name, address, and telephone number of the consumer reporting agency (including a toll-free telephone number established by the agency if the agency compiles and maintains

files on consumers on a nationwide basis) that furnished the report to the person; and

(B) a statement that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide the consumer the specific reasons why the adverse action was taken; and

(3) provide to the consumer an oral, written, or electronic notice of the consumer's right

(A) to obtain, under section 612 [§ 1681j], a free copy of a consumer report on the consumer from the consumer reporting agency referred to in paragraph (2), which notice shall include an indication of the 60-day period under that section for obtaining such a copy; and

(B) to dispute, under section 611 [§ 1681i], with a consumer reporting agency the accuracy or completeness of any information in a consumer report furnished by the agency.

(b) Adverse action based on information obtained from third parties other than consumer reporting agencies

(1) In general

Whenever credit for personal, family, or household purposes involving a consumer is denied or the charge for such credit is increased either wholly or partly because of information obtained from a person other than a consumer reporting agency bearing upon the consumer's credit worthiness,[1] credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living, the user of such information

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[1] So in original. Probably should be "creditworthiness,".

shall, within a reasonable period of time, upon the consumer's written request for the reasons for such adverse action received within sixty days after learning of such adverse action, disclose the nature of the information to the consumer. The user of such information shall clearly and accurately disclose to the consumer his right to make such written request at the time such adverse action is communicated to the consumer.

(2) Duties of person taking certain actions based on information provided by affiliate

(A) Duties, generally

If a person takes an action described in subparagraph (B) with respect to a consumer, based in whole or in part on information described in subparagraph (C), the person shall—

(i) notify the consumer of the action, including a statement that the consumer may obtain the information in accordance with clause (ii); and

(ii) upon a written request from the consumer received within 60 days after transmittal of the notice required by clause (i), disclose to the consumer the nature of the information upon which the action is based by not later than 30 days after receipt of the request.

(B) Action described

An action referred to in subparagraph (A) is an adverse action described in section 1681a(k)(1)(A) of this title, taken in connection with a transaction initiated by the consumer, or any adverse action described in clause (i) or (ii) of section 1861a(k)(1)(B) of this title.

(C) Information described

Information referred to in subparagraph (A)—

(i) except as provided in clause (ii), is information that—

(I) is furnished to the person taking the action by a person related by common ownership or affiliated by common corporate control to the person taking the action; and

(II) bears on the credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living of the consumer; and

(ii) does not include

(I) information solely as to transactions or experiences between the consumer and the person furnishing the information; or

(II) information in a consumer report.

(c) Reasonable procedures to assure compliance

No person shall be held liable for any violation of this section if he shows by a preponderance of the evidence that at the time of the alleged violation he maintained reasonable procedures to assure compliance with the provisions of this section.

(d) Duties of users making written credit or insurance solicitations on the basis of information obtained in consumer files

(1) In general

Any person who uses a consumer report on any consumer in connection with any credit or insurance transaction that is not initiated by the consumer, that

is provided to that person under section 1681b(c)(1)(B) of this title, shall provide with each written solicitation made to the consumer regarding the transaction a clear and conspicuous statement that—

(A) information contained in the consumer's consumer report was used in connection with the transaction;

(B) the consumer received the offer of credit or insurance because the consumer satisfied the criteria for credit worthiness or insurability under which the consumer was selected for the offer;

(C) if applicable, the credit or insurance may not be extended if, after the consumer responds to the offer, the consumer does not meet the criteria used to select the consumer for the offer or any applicable criteria bearing on credit worthiness[2] or insurability or does not furnish any required collateral;

(D) the consumer has a right to prohibit information contained in the consumer's file with any consumer reporting agency from being used in connection with any credit or insurance transaction that is not initiated by the consumer; and

(E) the consumer may exercise the right referred to in subparagraph (D) by notifying a notification system established under section 1681b(e) of this title.

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[2] So in original. Probably should be "creditworthiness".

(2) Disclosure of address and telephone number; format

A statement under paragraph (1) shall—

(A) include the address and toll-free telephone number of the appropriate notification system established under section 1681b(e) of this title; and

(B) be presented in such format and in such type size and manner as to be simple and easy to understand, as established by the Commission, by rule, in consultation with the Federal banking agencies and the National Credit Union Administration.

(3) Maintaining criteria on file

A person who makes an offer of credit or insurance to a consumer under a credit or insurance transaction described in paragraph (1) shall maintain on file the criteria used to select the consumer to receive the offer, all criteria bearing on credit worthiness or insurability, as applicable, that are the basis for determining whether or not to extend credit or insurance pursuant to the offer, and any requirement for the furnishing of collateral as a condition of the extension of credit or insurance, until the expiration of the 3-year period beginning on the date on which the offer is made to the consumer.

(4) Authority of Federal agencies regarding unfair or deceptive acts or practices not affected

This section is not intended to affect the authority of any Federal or State agency to enforce a prohibition against unfair or deceptive acts or practices, including the making of false or misleading statements in connection with a credit or insurance transaction that is not initiated by the consumer.

(e) Red flag guidelines and regulations required

(1) Guidelines

The Federal banking agencies, the National Credit Union Administration, and the Commission shall jointly, with respect to the entities that are subject to their respective enforcement authority under section 1681s of this title—

(A) establish and maintain guidelines for use by each financial institution and each creditor regarding identity theft with respect to account holders at, or customers of, such entities, and update such guidelines as often as necessary;

(B) prescribe regulations requiring each financial institution and each creditor to establish reasonable policies and procedures for implementing the guidelines established pursuant to subparagraph (A), to identify possible risks to account holders or customers or to the safety and soundness of the institution or customers; and

(C) prescribe regulations applicable to card issuers to ensure that, if a card issuer receives notification of a change of address for an existing account, and within a short period of time (during at least the first 30 days after such notification is received) receives a request for an additional or replacement card for the same account, the card issuer may not issue the additional or replacement card, unless the card issuer, in accordance with reasonable policies and procedures—

(i) notifies the cardholder of the request at the former address of the cardholder and provides to

the cardholder a means of promptly reporting incorrect address changes;

(ii) notifies the cardholder of the request by such other means of communication as the cardholder and the card issuer previously agreed to; or

(iii) uses other means of assessing the validity of the change of address, in accordance with reasonable policies and procedures established by the card issuer in accordance with the regulations prescribed under subparagraph (B).

(2) Criteria

(A) In general

In developing the guidelines required by paragraph (1)(A), the agencies described in paragraph (1) shall identify patterns, practices, and specific forms of activity that indicate the possible existence of identity theft.

(B) Inactive accounts

In developing the guidelines required by paragraph (1)(A), the agencies described in paragraph (1) shall consider including reasonable guidelines providing that when a transaction occurs with respect to a credit or deposit account that has been inactive for more than 2 years, the creditor or financial institution shall follow reasonable policies and procedures that provide for notice to be given to a consumer in a manner reasonably designed to reduce the likelihood of identity theft with respect to such account.

(3) Consistency with verification requirements

Guidelines established pursuant to paragraph (1) shall

not be inconsistent with the policies and procedures required under section 5318(*l*) of title 31.

(f) Prohibition on sale or transfer of debt caused by identity theft

(1) In general

No person shall sell, transfer for consideration, or place for collection a debt that such person has been notified under section 605B has resulted from identity theft.

(2) Applicability

The prohibitions of this subsection shall apply to all persons collecting a debt described in paragraph (1) after the date of a notification under paragraph (1).

(3) Rule of construction

Nothing in this subsection shall be construed to prohibit—

(A) the repurchase of a debt in any case in which the assignee of the debt requires such repurchase because the debt has resulted from identity theft;

(B) the securitization of a debt or the pledging of a portfolio of debt as collateral in connection with a borrowing; or

(C) the transfer of debt as a result of a merger, acquisition, purchase and assumption transaction, or transfer of substantially all of the assets of an entity.

(g) Debt collector communications concerning identity theft

If a person acting as a debt collector (as that term is defined in subchapter V of this chapter on behalf of a third party that is a creditor or other user of a consumer

report is notified that any information relating to a debt that the person is attempting to collect may be fraudulent or may be the result of identity theft, that person shall—

(1) notify the third party that the information may be fraudulent or may be the result of identity theft; and

(2) upon request of the consumer to whom the debt purportedly relates, provide to the consumer all information to which the consumer would otherwise be entitled if the consumer were not a victim of identity theft, but wished to dispute the debt under provisions of law applicable to that person.

(h) Duties of users in certain credit transactions

(1) In general

Subject to rules prescribed as provided in paragraph (6), if any person uses a consumer report in connection with an application for, or a grant, extension, or other provision of, credit on material terms that are materially less favorable than the most favorable terms available to a substantial proportion of consumers from or through that person, based in whole or in part on a consumer report, the person shall provide an oral, written, or electronic notice to the consumer in the form and manner required by regulations prescribed in accordance with this subsection.

(2) Timing

The notice required under paragraph (1) may be provided at the time of an application for, or a grant, extension, or other provision of, credit or the time of communication of an approval of an application for, or

grant, extension, or other provision of, credit, except as provided in the regulations prescribed under paragraph (6).

(3) Exceptions

No notice shall be required from a person under this subsection if—

(A) the consumer applied for specific material terms and was granted those terms, unless those terms were initially specified by the person after the transaction was initiated by the consumer and after the person obtained a consumer report; or

(B) the person has provided or will provide a notice to the consumer under subsection (a) of this section in connection with the transaction.

(4) Other notice not sufficient

A person that is required to provide a notice under subsection (a) of this section cannot meet that requirement by providing a notice under this subsection.

(5) Content and delivery of notice

A notice under this subsection shall, at a minimum—

(A) include a statement informing the consumer that the terms offered to the consumer are set based on information from a consumer report;

(B) identify the consumer reporting agency furnishing the report;

(C) include a statement informing the consumer that the consumer may obtain a copy of a consumer report from that consumer reporting agency without charge; and

(D) include the contact information specified by that consumer reporting agency for obtaining such consumer reports (including a toll-free telephone number established by the agency in the case of a consumer reporting agency described in section 603(p) of this title.

(6) Rulemaking

(A) Rules required

The Commission and the Board shall jointly prescribe rules.

(B) Content.

Rules required by subparagraph (A) shall address, but are not limited to—

(i) the form, content, time, and manner of delivery of any notice under this subsection;

(ii) clarification of the meaning of terms used in this subsection, including what credit terms are material, and when credit terms are materially less favorable;

(iii) exceptions to the notice requirement under this subsection for classes of persons or transactions regarding which the agencies determine that notice would not significantly benefit consumers;

(iv) a model notice that may be used to comply with this subsection; and

(v) the timing of the notice required under paragraph (1), including the circumstances under which the notice must be provided after the terms offered to the consumer were set based on information from a consumer report.

(7) Compliance

A person shall not be liable for failure to perform the duties required by this section if, at the time of the failure, the person maintained reasonable policies and procedures to comply with this section.

(8) Enforcement

(A) No civil actions

Sections 1681n and 1681o of this title shall not apply to any failure by any person to comply with this section.

(B) Administrative enforcement.

This section shall be enforced exclusively under section 1681s of this title by the Federal agencies and officials identified in that section.

§ 1681n. Civil liability for willful noncompliance

(a) In general

Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—

(1)(A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000; or

(B) in the case of liability of a natural person for obtaining a consumer report under false pretenses or knowingly without a permissible purpose, actual damages sustained by the consumer as a result of the failure or $1,000, whichever is greater;

(2) such amount of punitive damages as the court may allow; and

(3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(b) Civil liability for knowing noncompliance

Any person who obtains a consumer report from a consumer reporting agency under false pretenses or knowingly without a permissible purpose shall be liable to the consumer reporting agency for actual damages sustained by the consumer reporting agency or $1,000, whichever is greater.

(c) Attorney's fees

Upon a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable in relation to the work expended in responding to the pleading, motion, or other paper.

§ 1681*o*. Civil liability for negligent noncompliance

(a) In general

Any person who is negligent in failing to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of

(1) any actual damages sustained by the consumer as a result of the failure; and

(2) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(b) Attorney's fees

On a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable in relation to the work expended in responding to the pleading, motion, or other paper.

§ 1681p. Jurisdiction of courts; limitation of actions

An action to enforce any liability created under this title may be brought in any appropriate United States district court, without regard to the amount in controversy, or in any other court of competent jurisdiction, not later than the earlier of—

(1) 2 years after the date of discovery by the plaintiff of the violation that is the basis for such liability; or

(2) 5 years after the date on which the violation that is the basis for such liability occurs.

§ 1681q. Obtaining information under false pretenses

Any person who knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses shall be fined under title 18, imprisoned for not more than 2 years, or both.

§ 1681r. Unauthorized disclosures by officers or employees

Any officer or employee of a consumer reporting agency who knowingly and willfully provides information concerning an individual from the agency's files to a person not authorized to receive that information shall be fined under Title 18, United States Code, imprisoned for not more than 2 years, or both.

§ 1681s. Administrative enforcement

(a) Enforcement by Federal Trade Commission.

(1) Compliance with the requirements imposed under this subchapter shall be enforced under the Federal Trade Commission Act [15 U.S.C.A. 41 et seq.] by the Federal Trade Commission with respect to consumer reporting agencies and all other persons subject thereto, except to the extent that enforcement of the requirements imposed under this title is specifically committed to some other government agency under subsection (b) hereof. For the purpose of the exercise by the Federal Trade Commission of its functions and powers under the Federal Trade Commission Act, a violation of any requirement or prohibition imposed under this title shall constitute an unfair or deceptive act or practice in commerce in violation of section 5(a) of the Federal Trade Commission Act [15 U.S.C.A. 45(a)] and shall be subject to enforcement by the Federal Trade Commission under section 5(b) thereof [15 U.S.C. 45(b)] with respect to any consumer reporting agency or person subject to enforcement by the Federal Trade Commission pursuant to this subsection, irrespective of whether that person is engaged in commerce or meets

any other jurisdictional tests in the Federal Trade Commission Act. The Federal Trade Commission shall have such procedural, investigative, and enforcement powers, including the power to issue procedural rules in enforcing compliance with the requirements imposed under this title and to require the filing of reports, the production of documents, and the appearance of witnesses as though the applicable terms and conditions of the Federal Trade Commission Act were part of this title. Any person violating any of the provisions of this title shall be subject to the penalties and entitled to the privileges and immunities provided in the Federal Trade Commission Act as though the applicable terms and provisions thereof were part of this title.

(2)(A) In the event of a knowing violation, which constitutes a pattern or practice of violations of this title, the Commission may commence a civil action to recover a civil penalty in a district court of the United States against any person that violates this title. In such action, such person shall be liable for a civil penalty of not more than $2,500 per violation.

(B) In determining the amount of a civil penalty under subparagraph (A), the court shall take into account the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

(3) Notwithstanding paragraph (2), a court may not impose any civil penalty on a person for a violation of section 1681s-2(a)(1) of this title unless the person has been enjoined from committing the violation, or ordered not to commit the violation, in an action or proceeding brought by or on behalf of the Federal Trade Commission, and has violated the injunction or order, and

the court may not impose any civil penalty for any violation occurring before the date of the violation of the injunction or order.

(b) Enforcement by other agencies

Compliance with the requirements imposed under this subchapter with respect to consumer reporting agencies, persons who use consumer reports from such agencies, persons who furnish information to such agencies, and users of information that are subject to subsection (d) of section 1681m of this title shall be enforced under

(1) section 8 of the Federal Deposit Insurance Act [12 U.S.C. 1818], in the case of—

(A) national banks, and Federal branches and Federal agencies of foreign banks, by the Office of the Comptroller of the Currency;

(B) member banks of the Federal Reserve System (other than national banks), branches and agencies of foreign banks (other than Federal branches, Federal agencies, and insured State branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25A of the Federal Reserve Act [12 U.S.C. 601 et seq., 611 et seq.], by the Board of Governors of the Federal Reserve System; and

(C) banks insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System) and insured State branches of foreign banks, by the Board of Directors of the Federal Deposit Insurance Corporation;

(2) section 8 of the Federal Deposit Insurance Act [12 U.S.C. 1818], by the Director of the Office of Thrift Supervision, in the case of a savings association the deposits of which are insured by the Federal Deposit Insurance Corporation;

(3) the Federal Credit Union Act [12 U.S.C. 1751 et seq.], by the Administrator of the National Credit Union Administration with respect to any Federal credit union;

(4) subtitle IV of title 49, by the Secretary of Transportation, with respect to all carriers subject to the jurisdiction of the Surface Transportation Board;

(5) part A of subtitle VII of title 49, by the Secretary of Transportation with respect to any air carrier or foreign air carrier subject to that part, and

(6) the Packers and Stockyards Act, 1921 [7 U.S.C. 181 et seq.] (except as provided in section 406 of that Act [7 U.S.C. 226, 227]), by the Secretary of Agriculture with respect to any activities subject to that Act.

The terms used in paragraph (1) that are not defined in this subchapter or otherwise defined in section 3(s) of the Federal Deposit Insurance Act (12 U.S.C. 1813(s)) shall have the meaning given to them in section 1(b) of the International Banking Act of 1978 (12 U.S.C. 3101).

(c) State action for violations

(1) Authority of States

In addition to such other remedies as are provided under State law, if the chief law enforcement officer of a State, or an official or agency designated by a State, has reason to believe that any person has violated or is violating this title, the State—

(A) may bring an action to enjoin such violation in any appropriate United States district court or in any other court of competent jurisdiction;

(B) subject to paragraph (5), may bring an action on behalf of the residents of the State to recover—

(i) damages for which the person is liable to such residents under sections 1681n and 1681*o*] as a result of the violation;

(ii) in the case of a violation described in any of paragraphs (1) through (3) of section 1681s-2(c) of this title, damages for which the person would, but for section 1681s-2(c) of this title, be liable to such residents as a result of the violation; or

(iii) damages of not more than $1,000 for each willful or negligent violation; and

(C) in the case of any successful action under subparagraph (A) or (B), shall be awarded the costs of the action and reasonable attorney fees as determined by the court.

(2) Rights of Federal regulators

The State shall serve prior written notice of any action under paragraph (1) upon the Federal Trade Commission or the appropriate Federal regulator determined under subsection (b) of this section and provide the Commission or appropriate Federal regulator with a copy of its complaint, except in any case in which such prior notice is not feasible, in which case the State shall serve such notice immediately upon instituting such action. The Federal Trade Commission or appropriate Federal regulator shall have the right—

(A) to intervene in the action;

(B) upon so intervening, to be heard on all matters arising therein;

(C) to remove the action to the appropriate United States district court; and

(D) to file petitions for appeal.

(3) Investigatory powers

For purposes of bringing any action under this subsection, nothing in this subsection shall prevent the chief law enforcement officer, or an official or agency designated by a State, from exercising the powers conferred on the chief law enforcement officer or such official by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

(4) Limitation on State action while Federal action pending

If the Federal Trade Commission or the appropriate Federal regulator has instituted a civil action or an administrative action under section 8 of the Federal Deposit Insurance Act [12 U.S.C. 1818] for a violation of this subchapter, no State may, during the pendency of such action, bring an action under this section against any defendant named in the complaint of the Commission or the appropriate Federal regulator for any violation of this title that is alleged in that complaint.

(5) Limitations on State actions for certain violations

(A) Violation of injunction required

A State may not bring an action against a person under paragraph (1)(B) for a violation described in any

of paragraphs (1) through (3) of section 1681s-2(c) of this title, unless—

(i) the person has been enjoined from committing the violation, in an action brought by the State under paragraph (1)(A); and

(ii) the person has violated the injunction.

(B) Limitation on damages recoverable

In an action against a person under paragraph (1)(B) for a violation described in any of paragraphs (1) through (3) of section 1681s-2(c) of this title, a State may not recover any damages incurred before the date of the violation of an injunction on which the action is based.

(d) Enforcement under other authority

For the purpose of the exercise by any agency referred to in subsection (b) of this section of its powers under any Act referred to in that subsection, a violation of any requirement imposed under this subchapter shall be deemed to be a violation of a requirement imposed under that Act. In addition to its powers under any provision of law specifically referred to in subsection (b) of this section, each of the agencies referred to in that subsection may exercise, for the purpose of enforcing compliance with any requirement imposed under this subchapter any other authority conferred on it by law.

(e) Regulatory authority

(1) The Federal banking agencies referred to in paragraphs (1) and (2) of subsection (b) of this section shall jointly prescribe such regulations as necessary to carry out the purposes of this subchapter with respect to any persons identified under paragraphs (1) and (2) of subsection (b) of this section, and the Board of

Governors of the Federal Reserve System shall have authority to prescribe regulations consistent with such joint regulations with respect to bank holding companies and affiliates (other than depository institutions and consumer reporting agencies) of such holding companies.

(2) The Board of the National Credit Union Administration shall prescribe such regulations as necessary to carry out the purposes of this subchapter with respect to any persons identified under paragraph (3) of subsection (b) of this section.

(f) Coordination of consumer complaint investigations

(1) In general

Each consumer reporting agency described in section 1681a(p) of this title shall develop and maintain procedures for the referral to each other such agency of any consumer complaint received by the agency alleging identity theft, or requesting a fraud alert under section 1681c-1 of this title A or a block under section 1681c-2 of this title.

(2) Model form and procedure for reporting identity theft

The Commission, in consultation with the Federal banking agencies and the National Credit Union Administration, shall develop a model form and model procedures to be used by consumers who are victims of identity theft for contacting and informing creditors and consumer reporting agencies of the fraud.

(3) Annual summary reports

Each consumer reporting agency described in section 1681a(p) of this title shall submit an annual summary

report to the Commission on consumer complaints received by the agency on identity theft or fraud alerts.

(g) FTC regulation of coding of trade names

If the Commission determines that a person described in paragraph (9) of section 1681s-2(a) of this title has not met the requirements of such paragraph, the Commission shall take action to ensure the person's compliance with such paragraph, which may include issuing model guidance or prescribing reasonable policies and procedures, as necessary to ensure that such person complies with such paragraph.